Supreme Court, U.S.
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No. 91-222

In The

Supreme Court of the United States

October Term, 1991

STATE OF HAWAII,

Petitioner,

vs.

JONATHAN K. KIPI,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

BRIEF IN OPPOSITION

RICHARD W. POLLACK
Public Defender
State of Hawaii

THEODORE Y.H. CHINN
Deputy Public Defender
State of Hawaii

LYNETTE MAH MATSUSHIMA*
Deputy Public Defender
State of Hawaii

*Counsel of Record

Suite A-135
1130 North Nimitz Highway
Honolulu, Hawaii 96817
(808) 586-2080

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Hawaii Supreme Court properly applied *Grady v. Corbin*, 495 U.S. ___, 109 L.Ed.2d 548 (1990), to hold that prosecution of defendant for substantive offenses was barred by double jeopardy where such offenses were based on the same conduct that led to defendant's prior criminal contempt conviction and sentence.

2. Whether the corollary to the *Grady* rule also bars the prosecution in the instant case.

3. Whether *Grady v. Corbin*, 495 U.S. ___, 109 L.Ed.2d 548 (1990), should be affirmed when the instant case reaffirms the reasonableness of the *Grady* rule and amply demonstrates its necessity in prohibiting repeated attempts to prosecute defendants for identical conduct.

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STATE OF HAWAII,

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vs.

JONATHAN K. KIPI,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

BRIEF IN OPPOSITION

Respondent Jonathan K. Kipi ("Kipi") respectfully prays that the Court deny the petition for writ of certiorari to review the opinion and judgment on appeal of the Supreme Court of the State of Hawaii entered in the above-entitled proceeding on May 8, and 20, 1991.

OPINIONS BELOW

The Opinion of the Supreme Court of the State of Hawaii dated May 8, 1991, is reported in 72 Haw. ___, 811

P2d 815 (1991) and was reprinted in the Petition as Appendix ("App.") "A", therein.

The proceeding of the preliminary hearing on October 16, 1989, in the District Court of the First Circuit, Honolulu Division, State of Hawaii, for the offense of Burglary in the First Degree in the instant case and the District Court's oral ruling committing Kipi to Circuit Court for trial following the hearing is set forth in the original record in Cr. No. 89-1647 ("R.") at pages 78-98, which is reprinted at Appendix ("App.") "A", *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 701-109(1)(a), (2), (3), and (4)(a) of the Hawaii Revised Statutes (1985) provides that

> § 701-109 Method of prosecution when conduct establishes an element of more than one offense.
>
> (1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. He may not, however, be convicted of more than one offense if:
>
> (a) One offense is included in the other, as defined in subsection (4) of this section.
>
> (2) Except as provided in subsection (3) of this section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same episode, if such offenses are known to the appropriate

prosecution officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

(3) When a defendant is charged with two or more offenses based on the same conduct or arising from the same episode, the court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.

(4) A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when:

(a) It is established by proof of the same of less than all the facts required to establish the commission of the offense charged.

STATEMENT OF THE CASE

On July 24, 1989, Linda Yamasaki ("Yamasaki") filed an Ex Parte Petition for a Temporary Restraining Order for Protection against Kipi. R. at 69. The petition asked for the following: (1) that Kipi be enjoined from contacting, threatening, or abusing Yamasaki, her child and any other person residing with her; (2) that he be enjoined from telephoning Yamasaki; (3) that he be enjoined from entering or visiting her residence; and (4) that he be enjoined from contacting, threatening, or abusing her at work. *Id.*

On August 7, 1989, the Family Court granted Yamasaki's petition and a Temporary Restraining Order for Protection (TRO) was filed. R. at 72-74. On that same date, a Hearing to Show Cause as to why the TRO should not continue to be in effect was set for August 21, 1989. *Id.*

On August 21, 1989, following the Hearing to Show Cause on Yamasaki's petition, a Protective Order was issued by the Family Court, with one of the terms of the order as follows:

> Petitioner (Yamasaki) and Respondent (Kipi) are mutually enjoined and restrained from contacting, threatening or abusing each other and anyone living with the other party (including but not limited to their home or place of employment) and maliciously damaging the property of the other party.

Pet. App. at 27a-29a. The order was to remain in effect until February 17, 1990. Pet. App. at 27a.

Thereafter, on October 11, 1989, Yamasaki was asleep with her boyfriend Sergio Chaulet ("Chaulet") in her residence and was awakened at 4:00 a.m. when she heard mumbling in her bedroom. Br. Opp. App. at 3a-4a. She looked up and saw Kipi. *Id.* Kipi began yelling at Chaulet, asking him if he wanted to die. Br. Opp. App. at 5a. Kipi also told Yamasaki that if he ever saw her with anyone else, Kipi would kill that person. Br. Opp. App. at 5a.

David Harris ("Harris") was Yamasaki's roommate at her residence. Br. Opp. App. at 13a. Harris' girlfriend also resided there. *Id.* Apparently hearing the commotion, Harris went into Yamasaki's bedroom and told Kipi that

he would call the police if Kipi did not leave. Br. Opp. App. at 14a. Thereafter, Kipi, Chaulet, and Harris all went into the living room. Br. Opp. App. at 16a. When Harris attempted to use the telephone to call the police, Kipi took the phone away from Harris and threatened to use it on him. *Id.* Harris and Chaulet both left the house to call the police, leaving Kipi with Yamasaki and Harris' girlfriend. *Id.* Yamasaki told Kipi to leave and he left. *Id.*

The following day, on October 12, 1989, Police Officer Hyran Smith filed a Family Court Petition against Kipi alleging that on October 11, 1989, Kipi intentionally disobeyed the Protective Order thereby committing the offense of Criminal Contempt of Court in violation of HRS § 710-1077. Pet. App. at 39a-40a.

Five days following the incident, on October 16, 1989, prior to trial on the charge of contempt of court, a preliminary hearing was held at District Court of the first Circuit, Honolulu Division, charging Kipi with Burglary in the First Degree arising out of the identical incident of October 11, 1989. Br. Opp. App. at 1a-20a. Following the hearing, Kipi was bound over to Circuit Court for trial. Br. Opp. App. at 19a.

On October 24, 1989, a complaint was filed against Kipi in Circuit Court for the offense of Burglary in the First Degree, Count I, in violation of HRS § 708-810(1)(c), and, in addition, the complaint also charged Kipi with three counts of Terroristic Threatening in the Second

Degree[1], Counts II, III and IV, in violation of HRS § 707-717(1). Pet. App. at 41a-43a. On November 6, 1989, Kipi pleaded not guilty to the charges against him in the Circuit Court.

On December 7, 1989, the State, represented by Deputy Prosecuting Attorney Marcus Oshiro, was ready to proceed to trial in the Family Court on the Contempt charge against Kipi. Affidavit of Marcus Oshiro, which is reprinted as App. "B". All of the State witnesses were present including Linda Yamasaki, David Harris, and Sergio Chaulet, the complaining witnesses, and Rebecca Moore, David Harris' girlfriend. *Id.* Kipi moved for a change of plea and entered a plea of no contest. *Id.* The State did not object to the change of plea, but did ask for 5 months of incarceration due to the "egregious nature of the offense". *Id.* At the change of plea hearing, the State offered the following factual basis in support of the charge of contempt:

> a. The violation of the Protective Order did arise out of an incident in which Defendant did contact Petitioner, Ms. Linda Yamasaki at her home on October 11, 1989, very early in the morning.
>
> b. Ms. Linda Yamasaki was asleep at the time and awoke upon hearing the Defendant enter into her home.
>
> c. Also awakened by Defendant's entrance into the home were Mr. David Harris, Mr. Serio (sic)

---

[1] Terroristic Threatening in the Second Degree is a misdemeanor which may be prosecuted by complaint without the necessity of a preliminary hearing. Rule 7(a) and (b), Hawaii Rules of Penal Procedure.

> Chaulet, and Ms. Rebecca Moore, all whom reside with Ms. Yamasaki.
>
> d. At the time of the violation, the Defendant did make verbal threats to Ms. Linda Yamasaki, Mr. Serio (sic) Chaulet, and Mr. David Harris.

Br. Opp. App. at 22a. In addition, the State noted for the record that "additional criminal charges may be brought against the Defendant based upon his reading of the police report." Br. Opp. App. at 23a. The State has stipulated that Deputy Prosecuting Attorney Marcus Oshiro knew of the pending burglary charge and the terroristic threatening charges that had been filed in the Circuit Court. Pet. App. at 21a. Following the acceptance of the plea of no contest by the family court, Kipi was sentenced to 5 months incarceration. Pet. App. at 30a-32a.

On February 13, 1990, jury selection in Circuit Court began for the Burglary and Terroristic Threatening offenses. On February 15, 1990, the defense moved orally to dismiss the entire complaint based on double jeopardy and the compulsory joinder rule provided in HRS § 701-109. Pet. App. at 19a. At the hearing on the motion, the trial court agreed that Kipi was being retried for the same actions for which he was then serving five months' incarceration. Pet. App. at 24a-25a. The court recognized that although the contempt charge under Family Court was a separate charge, the court looked nevertheless to the underlying basis for the charges. *Id.* Accordingly, the court dismissed Counts I and II involving Linda Yamasaki with prejudice because the court believed that the family court order specifically dealt with Linda Yamasaki alone. *Id.*

However, the trial court denied the defense's motion to dismiss Counts III and IV, the Terroristic Threatening charges against Sergio Chaulet and David Harris, on the grounds that the court believed that these cases were separate offenses and outside the jurisdiction of the Family Court when that court adjudicated the contempt offense. Pet. App. at 25a.

The State appealed the dismissal of Counts I & II. The Hawaii Supreme Court held that the compulsory joinder rule provided in HRS § 701-109(2) apply to contempt charges and that a contempt charge must therefore be tried with any other offense arising from the same conduct. Pet. App. at 7a-8a. However, an exception to the compulsory joinder rule is applicable in this case because the contempt offense and the substantive offenses could not have been tried within the jurisdiction of a single court. Pet. App. at 8a. But, the Hawaii Supreme Court held that the *Grady* rule applies and therefore double jeopardy barred the subsequent prosecution for the offenses of burglary and terroristic threatening. Pet. App. at 9a-15a. Accordingly, the Hawaii Court affirmed the dismissal of Counts I and II and, in addition, directed that Counts III & IV also be dismissed. Pet. App. at 16a.

REASONS FOR DENYING THE WRIT

In the Petition for Writ of Certiorari, the State of Hawaii (hereinafter "State") stretches the holding in *Grady v. Corbin*, 495 U.S. ___, 109 L.Ed.2d 548 (1990), beyond the clear language enunciated, in order to seek the reversal of the decision by the Hawaii Supreme Court in *State v. Kipi*,

71 Haw. ___, 811 P.2d 815 (1991). Asserting that the Hawaii court was confused by the *Grady* rule, the State attacks the Hawaii Supreme Court, saying that the Hawaii Court "flouted" the entire rationale and structure of *Grady* and that there could be "no reasoned claim" that the Hawaii Court kept within *Grady*'s own logic. Pet. at 10. In addition, the State seeks to overturn the *Grady* rule, asserting that it suffers from "doctrinal weakness" and contains practical problems. *Id.*

Kipi submits that under the facts of this case, the Hawaii Supreme Court correctly applied the *Grady* rule. Moreover, the facts of this case reaffirm the reasonableness of the *Grady* rule and amply demonstrate its necessity in prohibiting repeated attempts to prosecute defendants for identical conduct.

I. The Hawaii Supreme Court properly applied the *Grady* rule.

In its criticism of the Hawaii Supreme Court, the State ignores the plain and obvious language of the *Grady* rule, that double jeopardy bars a subsequent prosecution if the State,

> to establish an essential element of an offense charged in that prosecution, will *prove conduct that constitutes an offense* for which the defendant has already been prosecuted.

Grady, 109 L.Ed.2d at 564 (emphasis added). Instead of the above rule, the State contends that *Grady* established the following rule:

> The majority decision in *Grady* limited its expansive holding to bar only those subsequent prosecutions in which the government, to establish an essential element of an offense charged in that prosecution, will prove the *entire* conduct constituting *all the elements* of the offense for which he had already been prosecuted.

Pet. at 11 (emphasis original). The State extrapolated this distorted interpretation by citing to the language in *Grady*, where it was applying the facts of the case to the newly-enunciated rule, which found that reprosecution of Corbin would result in proof of the "entirety of the conduct for which Corbin was convicted". 109 L.Ed.2d at 565-566. In addition, the State cited to the language in *Grady* which held that the bar of double jeopardy would be equally applicable to a "component offense":

> (I)f in the course of securing a conviction for one offense the State necessarily has proved the conduct comprising all of the elements of another offense not yet prosecuted (a "component offense"), the Double Jeopardy Clause would bar subsequent prosecution of the component offense.

Id. at 564 n. 11. Reading all of the cited language together, the State argues that the rule should be as quoted above. Moreover, the State further misinterprets the *Grady* rule by arguing that,

> Because the State will therefore not prove all elements of the criminal contempt offense, the Hawaii Supreme Court's holding that the prosecution of the terroristic threatening charges is barred by *Grady* is plainly in error.

Pet. at 13 (footnote omitted). This statement by the State shows that it believes that *conduct* is not the focus in *Grady*, but instead the test is whether or not the prosecution of the subsequent offense will prove "all elements" of the prior offense.

The *Grady* rule cannot be as the State contends. If it is, then the prior offense would merely be a lesser-included offense of the subsequent offense, since all the elements of the prior offense must be proved in the subsequent offense. Indeed, it would be no different than the *Blockburger* test since under the State rule, "proof of the entire conduct constituting all the elements of the offense for which the defendant had already been prosecuted" is equivalent to the *Blockburger* rule which bars reprosecution if "each statute does not 'require proof of a fact which the other does not' ". But the *Grady* rule was established because "a subsequent prosecution must do more than merely survive the *Blockburger* test." 109 L.Ed.2d at 564.

The *Grady* rule states that double jeopardy bars a subsequent prosecution if the State,

> to establish an essential element of an offense charged in that prosecution, will *prove conduct that constitutes an offense* for which the defendant has already been prosecuted.

109 L.Ed.2d at 564. The focus of the rule is on conduct, not the elements of the prior offense. It is conduct that constitutes an offense, not conduct that constitutes all of the elements of the offense. Here, conduct on the part of Kipi that constitutes the offense of contempt was his act of entering Yamasaki's residence and threatening her and

her two housemates. That is the entirety of Kipi's conduct on the night of the incident. It is the identical conduct which was to be used by the State in the burglary and terroristic threatening offenses. Clearly, the Hawaii Supreme Court was correct in its decision.

II. The *Grady* corollary also supports the decision of the Hawaii Supreme Court.

Moreover, *Grady* also held that double jeopardy bars subsequent prosecution of the "component offense":

> Similarly, if in the course of securing a conviction for one offense the State necessarily has proved the *conduct comprising all of the elements of another offense not yet prosecuted* (a "component offense"), the Double Jeopardy Clause would bar subsequent prosecution of the component offense.

Grady, 109 L.Ed.2d at 564, n. 11 (emphasis added). Kipi concurs with the State that the Hawaii Court did not reach this corollary to the rule in *Grady*. *See* Pet. at 13 n. 5. Nevertheless, Kipi submits that had the Hawaii Court reached this issue, the holding in *Kipi* would be the same.

The facts in this case clearly fit *Grady's* corollary. The conduct which the State used to secure the contempt conviction and the resulting 5 months jail sentence, was the same conduct which comprised all of the elements of the offense of Burglary in the First Degree and Terroristic Threatening in the Second Degree. The Hawaii Court observed that "Kipi's entering of Yamasaki's house and his threats to her and two of her housemates was the exact conduct that constituted the offense of contempt

with respect to the family court's protective order". Pet. App. at 12a. The State similarly observed that the conduct proved at the contempt prosecution was that "Kipi entered Yamasaki's home, awakened her and her housemates, and threatened Yamasaki, Chaulet, and Harris." Pet. at 14 n. 5.

Nevertheless, the State argues that judgment could not be affirmed under the *Grady* corollary because the "State would clearly not have to establish in its criminal contempt case all of the elements of the burglary charge." Pet. at 14 n. 5. The State further argues that "(s)pecifically, the State would not have to establish that Kipi entered Yamasaki's home 'with the intent to commit therein a crime' ", an essential element to the charge of Burglary in the First Degree. *Id.* This is so because the "State was merely going to prove that Kipi entered Yamasaki's home, awakened her and her housemates, and threatened Yamasaki, Chaulet, and Harris." *Id.*

Although the State is logically correct in the above quoted statements, *Grady's* corollary states a different test. It bars subsequent prosecution where in the prior prosecution the State "necesarily has proved the *conduct* comprising all of the elements" of the offense charged in the subsequent prosecution. 109 L.Ed.2d at 564 n. 11. The key focus is the *conduct* which was proved, rather than the elements of the offense. The corollary did not state that "the State necessarily has proved all of the elements of another offense". Instead, it is whether "the State necessarily has proved the conduct comprising all of the elements of another offense". *Id.* The State's argument is in essence the *Blockburger* test. But *Grady* sets forth a test in addition to the *Blockburger* test.

Further, there are a number of ways in which the State may prove "intent to commit therein a crime". The proof varies with the facts of each case. In this case, the State would have used the fact that Kipi threatened Yamasaki, Chaulet and Harris to establish that Kipi entered Yamasaki's residence with the "intent to commit therein a crime". The preliminary hearing on the Burglary charge supports this. Br. Opp. App. "B".

The State elected to use these threats in the prosecution of Kipi for the contempt offense. The State used this conduct to establish that Kipi violated the Protective Order which had enjoined Kipi "from contacting, threatening or abusing (Yamasaki) and anyone living with the other party". Pet. App. at 28a. Indeed, the prosecutor relied upon the same conduct again when he asked the Family Court to impose "five months of incarceration . . . upon the Defendant due to the egregious nature of the offense". The trial court in the instant case found that,

> THE COURT: . . .
>
> And it is clear to the Court that this defendant is being retried in this case for the same actions for which he is currently serving five months incarceration as previously ordered by Judge William Smith in the family court proceeding.
>
> . . .
>
> And it's clear from all that's been presented to the Court by the prosecution in this case that Judge Smith (Family Court judge) considered all of defendant's actions, the actions in threatening

> the housemates, the actions in threatening Ms. Yamasaki, and the breaking in. And as a result of that, sentenced this defendant to five months in jail.

Pet. App. at 24a. The trial court recognized that the State would have used the identical conduct to prove the instant case that was used in the prosecution for the contempt offense. The State failed to show that there were "two separate offenses". *Grady*, 109 L.Ed.2d at 565 n. 14. Thus, the State "in the course of securing a conviction for" the offense of contempt, "necessarily has proved the conduct comprising all of the elements of" Burglary in the First Degree.

Similarly, by presenting proof that Kipi had threatened Yamasaki, Chaulet and Harris in support of the violation of the Protective Order, the State "necessarily has proved the *conduct* comprising all of the elements of" the three charges of Terroristic Threatening in the Second Degree.

III. The instant case reaffirms the reasonableness of the *Grady* rule and amply demonstrates its necessity in prohibiting repeated attempts to prosecute defendants for the identical conduct.

The State argues for the overruling of *Grady* saying that the decision in *Kipi* demonstrates that the rule "easiiy disintegrates into the general 'single transaction' test that has long been condemned by this Court's Double Jeopardy jurisprudence, and which is condemned even in *Grady* itself". Pet. at 17-18 (footnote omitted) (citation omitted). The State states that "as the Supreme Court of

Hawaii could not help but observe, "what the new double jeopardy test in effect requires is that prosecutors observe a rule previously rejected by the Supreme Court 'that all charges arising out of a single occurence must be joined in a single indictment' ". Pet. at 18 (citation omitted).

In the context of the *Kipi* decision and the statutory provision in Hawaii requiring compulsory joinder, the Hawaii Supreme Court's observation is correct. The observation made by the Hawaii Supreme Court in *Kipi*, requiring joinder of all charges arising out of a single occurence, must be construed in light of HRS § 701-109(2), the compulsory joinder rule. The Hawaii Court held that, under the compulsory joinder rule, the contempt charge must be tried together with other offenses arising from the same conduct. However, the Hawaii Court also held that because Family Court had exclusive original jurisdiction over the contempt charge and did not have jurisdiction over the substantive charges, the statutory exception to the compulsory joinder rule applied. But with the existence of the *Grady* decision, this exception is now subject to constitutional challenge.

The Hawaii Supreme Court, mindful of the compulsory joinder rule in Hawaii, then made the observation that all charges from a single occurence must be in a single indictment. This was but a reminder to the prosecution to ensure that all charges arising out of a single occurrence be joined in the same indictment, lest they be subject not only to scrutiny under the compulsory joinder rule but also to the double jeopardy bar under the *Grady* rule.

Moreover, the facts in this case do not present a situation where it could be said that the "same transaction" test was applied. The State in this case elected to prosecute Kipi for the contempt by presenting evidence that he entered Yamasaki's residence, awakened her and threatened her and her housemates. Not only did the State present the sum total of Kipi's conduct in the contempt prosecution, it also asked of the Family Court that Kipi be given a harsher sentence "based on the egregious nature of the offense". It elected to separately prosecute Kipi knowing that there were pending burglary and terroristic threatening charges and aware that consolidation of all charges including the contempt charge may be achieved by waiver.

The Superior Court of New Jersey made the following observation in a similar case involving a prior prosecution for contempt of court and a subsequent prosecution for assault:

> One final comment deserves attention before leaving the subject. We have thoroughly reviewed the transcript of the first trial. Our exhaustive examination of the record clearly discloses that the sole factual issue before the jury was whether defendant committed an assault and battery on Hardell. In an abstract sense, it is possible that the jury acquitted defendant for reasons other than its disbelief that he physically attacked the job supervisor. For example, it is conceivable that the jury found defendant was not aware of the court order, or that the attack upon Hardell did not interfere with the rights of workers to enter the job site. We are convinced from our reading of the transcript, however, that

> these were not seriously contested factual issues. In short, the gist of the contempt charge was that defendant physically attacked Hardell. The jury was not satisfied that the prosecutor's proofs established that offense beyond a reasonable doubt. Putting aside technical concepts of double jeopardy, it is plain to us that defendant was tried and acquitted of the "same offense" for which he is now being prosecuted. This is unfair and contrary to the design of the federal and state Constitutions.

State v. White, 248 N.J. Super. 515, 591 A.2d 954, 958-959 (1991). Similarly, as the facts in this case shows, Kipi is being prosecuted for the identical conduct for which he was previously prosecuted and sentenced to 5 months in jail for the "egregious nature of the offense".

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Dated: Honolulu, Hawaii, September 5, 1991.

RICHARD W. POLLACK
Public Defender
State of Hawaii

THEODORE Y.H. CHINN
Deputy Public Defender
State of Hawaii

LYNETTE MAH MATSUSHIMA*
Deputy Public Defender
State of Hawaii

*Counsel of Record

Suite A-135
1130 North Nimitz Highway
Honolulu, Hawaii 96817
(808) 586-2080

Counsel for Respondent

EXHIBIT D

IN THE DISTRICT COURT
OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAII

STATE OF HAWAII vs. JONATHAN K. KIPI, Defendant.	VIOLATION OF SECTION 708-810(1)(C) H.R.S. REPORT NO. 89349303 CASE NO. 3P of 10/16/89

TRANSCRIPT

of proceedings had in the above-entitled matter on the 16th day of October, 1989, before the HONORABLE BAMBI E. WEIL, Judge, Presiding.

APPEARANCES:

Attorney for the State	BARBARA ANN T. KONNO Deputy Prosecuting Attorney 1164 Bishop Street Honolulu, Hawaii 96813
Attorney for Defendant	JACK TONAKI Deputy Public Defender 1130 N. Nimitz Hwy., #A-135 Honolulu, Hawaii 96817

TRANSCRIBED FROM TAPE BY:

CYNTHIA TANDO
Official Court Reporter
District Court of the
First Circuit
State of Hawaii

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[p. 3] MONDAY, OCTOBER 16, 1989 Afternoon Session

MS. KONNO: Good afternoon again, Your Honor. Barbara Ann. T. Konno, deputy prosecuting attorney, appearing on behalf of the State.

THE COURT: Good afternoon again to you.

MS. KONNO: This is case 3P on the calendar.

MR. TONAKI: Good afternoon, Your Honor. Jack Tonaki on behalf of Jonathan Kipi. And Mr. Kipi is present.

THE COURT: Good afternoon to you. And is the defense ready to proceed?

MR. TONAKI: We are.

THE COURT: The State ready?

MS. KONNO: Yes, Your Honor.

THE COURT: You may proceed, Ms. Konno.

MS. KONNO: Thank you. My first witness is Linda Yamasaki.

LINDA YAMASAKI,

called as a witness by the Prosecution, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. KONNO:

Q Please state your name.

A Linda (unintelligible) Yamasaki.

[p. 4] Q And where were you living on October 11th, 1989?

A 3218 Francis Street.

Q Is that in Kapahulu?

A Yes.

Q On that date at about 4:00 a.m. did you learn that your house had been entered?

A Yes.

Q How did you learn that?

A I was – I was asleep when I looked up and I saw my ex-boyfriend Jonathan K. Kipi.

Q Okay. How – and how – how were you woken up?

A I heard mumbling, and then I looked up and there he was.

Q Okay. And if you were to see Jonathan Kipi again could you recognize him?

A Yes.

Q Is he present in the courtroom today?

A Yes.

Q Can you please point him out and describe what he's wearing.

A White t-shirt, green – dark green cover.

Q Is he sitting at the end of this table?

A Yes.

MS. KONNO: Your Honor, may the record [p. 5] reflect that the witness has identified the defendant?

THE COURT: Yes.

BY MS. KONNO:

Q Now, Miss Yamasaki, when you heard the mumbling and woke up, what happened?

A He started to yell and talk loud.

Q Okay. And what was he yelling?

A I couldn't really understand. All he told – I was up, and then he said to Sergio to get up.

Q Okay. And who is Sergio?

A My boyfriend now.

Q Okay. And was Sergio in the bedroom sleeping with you?

A Mm-hmm. He told him to get up and let's go outside right now.

Q All right. And did he continue yelling at Sergio?

A Mm-hmm.

Q What else did he say to Sergio?

A If he wanted to die.

Q All right. And tell me every – what else did he say?

A He told me if he ever saw me with anyone else that he would kill that person.

Q Okay. When he said that to you, were you [p. 6] afraid?

A Yes, 'cuz I couldn't – I was in shock. I don't know what to do. I thought he was going to kill him.

Q And when you say "him," you mean Sergio?

A Sergio, yes.

Q Do you know how the defendant entered your house?

A No. All I know is after I – I went out and the door is wide open.

Q All right. Did the defendant – did he have keys to your residence?

A He wasn't supposed to.

Q Could the front door have been unlocked?

A Possibly –

MR. TONAKI: Objection. Calls for speculation, Your Honor.

THE COURT: It's already been answered. So the record will stand.

BY MS. KONNO:

Q Did you – did you see any signs of forced entry into your house, Miss Yamasaki?

A No.

Q Okay. How long have you know the defendant Jonathan Kipi?

A [p. 7] Around four years.

Q And when you saw him on October 11th, 1989, did he have permission to enter your dwelling and to threaten you and your boyfriend?

A No.

Q Did all of this occur in the City and County of Honolulu, State of Hawaii?

A Yes.

MS. KONNO: No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. TONAKI:

Q Miss Yamasaki, are you still married to Mr. Kipi?

A We was never married.

Q Okay. He was your boyfriend at one time?

A Mm-hmm.

Q Is that right?

A Yes.

Q Okay. And do you have any children?

A One.

Q This was a boy or girl?

A A girl.

Q All right. And your daughter is – your daughter's father is Mr. Kipi; is that right?

[p. 8] A Mm-hmm. Yes.

Q Does your daughter live with you?

A Yes. She lives with me and she stays with my mother.

Q Now, this house on Francis Street, do you own that house?

A Mm-hmm. Yes.

Q And before – or – or while you were living with Mr. Kipi, did Mr. Kipi also live in that house?

A Yes.

Q Okay. How long did you and Mr. Kipi live there together?

A Three years. Little over three years.

Q And when did you and Mr. Kipi separate or break up?

A On July 11th.

Q Of this year?

A Mm-hmm.

Q 1989. After Mr. Kipi and yourself had broken up, had he ever been back to the house on Francis Street?

A A lot of times. Once he broke in.

Q About how many times had he been back to the house after you had broke up?

A Legally or any –

Q Legally or illegally.

[p. 9] A Probably around 10 times.

Q You said that he had broken in at least one time before?

A Mm-hmm.

Q How did – how had he gotten into the house?

A Through the window.

Q Did he cut the screen or broke the window?

A No, he – it used to be just hooked on. So he took off the hook and he pushed – pushed the jalousie up.

Q Had he tried to enter into – enter through the regular doorway?

A I'm not sure because I wasn't living at home. My friend saw him in the house and she called the police. By the time they came he was (unintelligible).

Q Now, you said after you had broken up he had been to the house about 10 times – you said legally or illegally.

A Mm-hmm.

Q Where there times that he came to the house with your permission?

A To drop off my daughter.

Q So he would continue to see your daughter?

A Mm-hmm. Not right after we broke up.

Q But in between October 11th and the time you [p. 10] had broken up, he had seen your daughter on occasion; is that right?

MS. KONNO: Objection, Your Honor. I believe that's the wrong date.

THE COURT: Mr. Tonaki, do you wish to rephrase or withdraw?

MR. TONAKI: All right.

BY MR. TONAKI:

Q Between the time that you had broken up and the time that you had noticed Mr. Kipi mumbling in your room, he had on occasion visited your daughter; is that right?

MS. KONNO: I'm going to object on the basis of relevance for purposes of this hearing, Your Honor.

MR. TONAKI: Your Honor, I think it – it goes to the burglary in this case and whether or not the – there was an illegal remaining on the premises.

THE COURT: Overruled. You may answer.

THE WITNESS: Could you repeat the question?

BY MR. TONAKI:

Q Between the time that he was in your room on this night and the time that you had broken up, he had on occasion visited your daughter; correct?

A He would call first and then he would come [p. 11] over, or he would pick her up and then bring her back.

Q When he would bring her back, would he come into the house?

A I wouldn't let him come in the house. He made excuses to come into the house.

Q And by excuses what do you mean?

A Like "I have to use the bathroom."

Q Okay. And would he do anything to you while he was in the house?

A He wouldn't want to leave.

Q Did Mr. Kipi want to get back together with you?

A Yes.

Q And he to told you that on several occasions?

MS. KONNO: Objection. Irrelevant, Your Honor.

THE COURT: Sustained.

BY MR. TONAKI:

Q You said that Jonathan Kipi wasn't supposed to have the keys; is that right?

A Yes.

Q While you were living together in the house, did he have keys to the house?

A Yes.

MS. KONNO: Objection –

[p. 12] THE COURT: I'm sorry. The question has already been answered. However, Miss Yamasaki, when you see the – any attorney on their feet, please do not answer the question until the Court has heard what the objection is the ruled upon it.

THE WITNESS: Okay.

THE COURT: You understand?

THE WITNESS: Mm-hmm.

THE COURT: Very well. You may proceed, Mr. Tonaki.

BY MR. TONAKI:

Q While Mr. Kipi was living with you in the house, did – did he have keys to the house?

MS. KONNO: Objection, Your Honor. Asked and answered.

THE COURT: Sustained.

MR. TONAKI: I – I didn't hear the answer for that question, Your Honor.

THE COURT: Let's go off the record.

(Off-the-record discussion.)

THE COURT: Court –

MR. TONAKI: I would ask the Court's excuse, Your Honor, but counsel was objecting at that time so I didn't really hear the witness' answer to that question.

[p. 13] THE COURT: It's all right. The Court overruled itself and will allow the witness to answer. Do you know what the question is that's pending now?

THE WITNESS: Did he have a set of keys to my house.

THE COURT: At what time, Mr. Tonaki?

THE WITNESS: When he was living –

BY MR. TONAKI:

Q When you – when you were living together.

A We only had one key. He was supposed to – he said he lost his key.

Q Did you make a copy of the keys for him?

A No.

MS. KONNO: Objection. Irrelevant, Your Honor.

THE COURT: Well, the question has been answered again.

THE WITNESS: I'm sorry. I'm sorry.

THE COURT: You need to wait if you could.

THE WITNESS: Okay.

THE COURT: Try it one more time, Mr. Tonaki.

BY MR. TONAKI:

Q Now, on this night when you – when you saw Mr. Kipi in your room, and this is I believe the night of the [p. 14] 11th or the night of the 12th, you said that you didn't notice anything unusual about your apartment as far as how he got into the apartment; is that correct?

A Yes.

Q Had you locked the door that evening, the front door to this house?

A My roommate was the last to – well, he had friends over, so they left.

Q Is this Sergio?

A No. My roommate David.

Q How many other people besides yourself and David live in the house?

A His girlfriend.

Q So there – there are three people who live in the house; is that right?

A Mm-hmm.

Q Yourself, David and David's girlfriend?

A Mm-hmm.

Q Do David and his girlfriend know Jonathan Kipi?

A Yes.

Q And when you woke up, when you saw Mr. Kipi in your room, did you notice at that point where the other two residents of the house were?

A Yes.

Q Where were they?

[p. 15] A In their bedroom.

Q Were they awake or were they sleeping?

A Well, they awoke when they heard the noise.

Q Where – where is the first point at which you noticed the other two residents of the house?

MS. KONNO: Objection. Irrelevant, Your Honor.

THE COURT: Overruled. You may answer.

THE WITNESS: When my roommate David came into my room and said that he was going to call the police if Jonathan didn't leave.

BY MR. TONAKI:

Q So is this while – while Jonathan was arguing with Sergio?

A Yes.

Q Now, are David and the girlfriend friends of Jonathan?

MS. KONNO: Objection. Irrelevant, Your Honor.

THE COURT: Mr. Tonaki?

MR. TONAKI: Your Honor, it may go toward the – as far as permission for being in the house of the unlawful remaining in the house. I think we have to know what relationship these other residents of the house had to the defendant.

[p. 16] MS. KONNO: Not for purposes of this probable cause hearing, Your Honor.

THE COURT: Well, it's true, don't you agree, that in *Toledo versus Lam* the defense can bring evidence of a defense in the preliminary hearing, and I am obligated to hear it, including that they can bring witnesses for that purpose.

So, given the offer of proof, the objection's overruled. You may answer the question.

THE WITNESS: No, they are not friends of Jonathan Kipi.

BY MR. TONAKI:

Q Do they know Jonathan?

A Yes.

Q When you first awoke and you saw Jonathan mumbling above your bed, could you at that point tell if anybody else was awake in the house?

A No.

Q When Jonathan was in your room, was the door to your bedroom open?

A Yes.

Q And were the lights on outside of your bedroom? Could you tell?

A No.

Q Was the – the house dark then?

[p. 17] A No, 'cuz the street lights shine in my room.

Q But as far as lamps or ceiling lights in the house, no other lights were on in the house; is that right?

A Yes.

Q When Jonathan started arguing with Sergio, did Sergio argue back or fight back?

A No.

Q Did Jonathan touch Sergio or touch you?

A No.

Q After this argument with Sergio, what did Jonathan do?

A Well, he told Sergio to go outside. So they left. And they left me in the room. David – they all – David, Jonathan and Sergio were in the living room.

When David tried to call the police, Jonathan tried to take the phone away from him. Well, he took the phone away from him and he was going to use it on David.

So they left – David and Sergio left to go and call the police, and left me and Rebecca, David's girlfriend, with Jonathan.

So when I tried to call the police, he started walking towards me. The receiver of the phone pulled out. And I yelled at him and I said "You better leave." So he left. After he left the police arrove (sic) [p. 18] within seconds.

Q Now, when you say that he was going to hit Sergio with the –

A Not Sergio.

Q Hit David with the – the phone receiver, what makes you say that?

A I heard him threatening David.

Q Did he swing the receiver at David?

A No. I heard him saying "I'm going to kill you. Who are you? You don't – this is – everything in this house is mine."

Q What was David saying to Jonathan?

A Nothing. What can you say?

Q And you said Sergio and David went to – or left the apartment; is that right?

A Yes. Not apartment, house.

Q I'm sorry. Sergio and David left the house.

THE COURT: Excuse me. Miss Yamasaki, do you need a recess to compose yourself? Let's go off the record a minute.

(Off-the-record discussion.)

BY MR. TONAKI:

Q Ms. Yamasaki, I don't have that much more. Okay. So, are you okay?

A Yes.

[p. 19] Q Do you want to take a break? Okay, I don't have too many – that much – too many more questions. Now –

THE COURT: You may continue.

MR. TONAKI: Thank you.

BY MR. TONAKI:

Q And you said that David and Sergio went to call the police; is that right?

A Yes.

Q How did you know that they were going to call the police?

A Because Johnny – Jonathan wouldn't let them use the phone.

Q So did they say that they were going –

A No, 'cuz they were afraid that he wouldn't let them use the phone. They were afraid that he would have done something.

Q So –

A They just left.

Q So David and Sergio just left the house then?

A Yes.

Q They didn't say where they were going; is that right?

A Yes.

Q And they left – when David and Sergio left the [p. 20] house, they left you and David's wife with Jonathan; is that right?

A His girlfriend. Yes.

MR. TONAKI: No further questions.

THE COURT: Any redirect?

MS. KONNO: No questions, Your Honor.

THE COURT: Thank you, Miss Yamasaki.

THE WITNESS: Thank you.

THE COURT: You may step down.

(Witness excused)

THE COURT: Anything further from the State?

MS. KONNO: No, Your Honor. The State rests at this time.

THE COURT: Any evidence from you Mr. Tonaki?

MR. TONAKI: No evidence for the defendant.

THE COURT: Does counsel submit?

MR. TONAKI: Yes.

MS. KONNO: Yes, Your Honor.

THE COURT: The Court finds there's probable cause to believe that Jonathan K. Kipi committed the offense of Burglary in the First Degree in violation of Section 708-810 Subsection (1) Subsection lower case [p. 21] (c) of Hawaii Revised Statutes and commits this matter to the Circuit Court.

The Court has before it a pretrial bail report. Do you wish to address yourself to that, Mr. Tonaki?

MR. TONAKI: Your Honor, we would simply ask at this point – there doesn't appear to be a sponsor that has been pre-screened by the Intake Service Center, but we would ask the Court to consider a bail reduction to the amount of a thousand dollars.

THE COURT: Any objection to that?

MS. KONNO: Yes, Your Honor.

THE COURT: The objection is sustained. Motion is denied.

(Whereupon, the proceedings concluded on October 16, 1989.)

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII)	CR. NO. 89-1647
)	
v.)	COUNT I:
JONATHAN K. KIPI,)	BURGLARY IN THE FIRST
Defendant.)	DEGREE
)	COUNTS II – IV:
)	TERRORISTIC THREATENING
)	IN THE SECOND DEGREE
)	
)	AFFIDAVIT OF MARCUS
)	OSHIRO

AFFIDAVIT

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

MARCUS OSHIRO, being first duly sworn, on oath deposes and says that:

1. Affiant was the Deputy Prosecuting Attorney, representing the State on December 7, 1989, 8:30 a.m., in State of Hawaii v. Jonathan Kineola Kipi, FC-Cr. 89-3049.

2. Defendant was represented by Deputy Public Defender Sheila Lippolt, and the Honorable William Smith presided that morning.

3. Affiant recalls that the State was ready and able to proceed to trial on the Contempt of Court charge that arose out of an alleged violation of a Protective Order, issued by Judge Albert Gould on August 21, 1989.

4. Affiant recalls that the Petitioner in the above Protective Order, Ms. Linda Yamasaki, was present in court and willing to testify that Defendant did violate the Protective Order on October 10, 1989.

5. Affiant recalls that other State witnesses, Mr. David Harris, Mr. Serio Chaulet, and Ms. Rebecca Moore, were also present in court and willing to testify that Defendant did enter onto the residence of Ms. Linda Yamasaki.

6. Affiant recalls that he did not object to the No Contest Plea, but asked that five months of incarceration be imposed upon the Defendant due to the egregious nature of the offense.

7. Affiant recalls that in responding to the Court's request for particular facts constituting the Protective Order violation, stated that:

a. The violation of the Protective Order did arise out of an incident in which Defendant did contact Petitioner, Ms. Linda Yamasaki at her home on October 11, 1989, very early in the morning.

b. Ms. Linda Yamasaki was asleep at the time and awoke upon hearing the defendant enter into her home.

c. Also awakened by Defendant's entrance into the home were Mr. David Harris, Mr. Serio Chaulet, and Ms. Rebecca Moore, all whom reside with Ms. Yamasaki.

d. At the time of the violation, the defendant did make verbal threats to Ms. Linda Yamasaki, Mr. Serio Chaulet, and Mr. David Harris.

8. Affiant did note on the record that it was his belief that additional criminal charges may be brought against the Defendant based upon his reading of the police report.

Further affiant sayeth naught.

/s/ Marcus Oshiro
MARCUS OSHIRO

Subscribed and sworn to before me
this 15th day of February, 1990.

/s/ _____
Notary Public, State of Hawaii

My commission expires: 4/14/90